No. 89-474 (6)

IN THE

Supreme Court of the United States

October Term, 1989

WILLIAM V. GRADY, DISTRICT ATTORNEY OF DUTCHESS COUNTY,

Petitioner,

vs.

THOMAS J. CORBIN,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR RESPONDENT

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Questions Presented

Whether the New York State Court of Appeals properly sustained respondent's claim of Double Jeopardy under the Constitution of the United States by holding that respondent's plea of guilty of and sentence for driving while intoxicated and failure to keep right prohibited the subsequent prosecution for manslaughter in the second degree, criminally negligent homicide, and assault in the third degree, charges arising out of the same event.

Whether Section 1800(d) of the New York Vehicle & Traffic Law is unconstitutional.

Statutory Provision Involved

New York Criminal Procedure Law § 170.20 provides:

> § 170.20. Divestiture of jurisdiction by indictment; removal of case to superior court at district attorney's instance.
>
> 1. If at any time before entry of a plea of guilty to or commencement of a trial of a local criminal court accusatory instrument containing a charge of misdemeanor, an indictment charging the defendant with such misdemeanor is filed in a superior court, the local criminal court is thereby divested of jurisdiction of such misdemeanor charge and all proceedings therein with respect thereto are terminated.
>
> 2. At any time before entry of a plea of guilty to or commencement of a trial of an accusatory instrument specified in subdivision one, the district attorney may apply for an adjournment of the proceedings in the local criminal court upon the ground that he intends to present the misdemeanor charge in question to a grand jury with a view to prosecuting it by indictment in a superior court. In such case, the local criminal court must adjourn the proceedings to a date which affords the district attorney reasonable opportunity to pursue such action, and may subsequently grant such further adjournments for that purpose as are reasonable under the circumstances. Following the granting of such adjournment or adjournments, the proceedings must be as follows:
>
> (a) If such charge is presented to a grand jury within the designated period and either an indictment or a dismissal of such charge results, the local

> criminal court is thereby divested of jurisdiction of such charge, and all proceedings in the local criminal court with respect thereto are terminated.
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> (b) If the misdemeanor charge is not presented to a grand jury within the designated period, the proceedings in the local criminal court must continue.

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BRIEF FOR RESPONDENT

Statement of the Case

On October 3, 1987, at approximately 6:35 p.m., respondent Thomas J. Corbin was involved in an automobile accident on State Highway 55 in the Town of

LaGrange, Dutchess County, New York. (J.A. 19).[1] Corbin's car came into contact with one automobile and then collided with another carrying Brenda and Daniel Dirago. After receiving a call from the Dutchess County Sheriff's office, Dutchess County Assistant District Attorney Dolan (the bureau chief supervising the other ADAs—Chase, Glick and Sauter--who subsequently shared responsibility for managing this case for the prosecution, T. 205), went to the scene of the accident that night (T. 205), pursuant to the practice of his office in such cases (T. 206). When he arrived, he learned that someone had been severely injured, and that Corbin had been arrested for driving while intoxicated (T. 206, 213). When asked by officers at the scene whether he "thought additional charges were appropriate," Dolan replied that he "didn't think so at that point" (T. 213). Later that same evening, Dolan was informed that Brenda Dirago had died. He took no action in response (T. 207).

Corbin was hospitalized that night for treatment of his injuries. While at the hospital, he was served with two traffic tickets: one for "DWI" (New York Vehicle & Traffic Law § 1192 [3]); one for "failure to keep right" (New York Vehicle & Traffic Law § 1120[a]) (*see* tickets, J.A. 3, 4). The tickets directed him to appear in the LaGrange Town Court on October 29, 1987 (*id.*). Corbin, who had admitted before his arrest that he had been drinking (J.A. 10, 20) consented to the taking of tests to determine the level of alcohol in his blood; those tests were performed at the

[1] "J.A." refers to the Joint Appendix. "Pet." refers to the Petition for a Writ of Certiorari. "App." refers to the Appellant's Appendix filed in the New York State Court of Appeals. "T." refers to the transcript of the County Court hearing included in the Appellant's Appendix filed in the New York State Court of Appeals. The decision of the New York State Court of Appeals, *Corbin v. Hillery*, 74 N.Y.2d 279, 543 N.E.2d 714, 545 N.Y.S.2d 71 (1989) appears at Pet. at 1a *et seq.*

hospital that same evening (J.A. 8, 20). His blood alcohol level was .19% (J.A. 20).

The members of the District Attorney's office began to work on this case almost immediately. In addition to ADA Dolan, the others responsible for this case were ADAs Glick, a DWI special prosecutor (T. 19); Chase, head of the DWI program (T. 51); and Sauter, who later appeared for the prosecution in the LaGrange Town Court. ADA Glick received the file "towards the end of the week beginning October 5th [1987]" (T. 20). On October 14th, he sent a letter to the LaGrange Town Court and to Corbin (App. 11) enclosing a Statement of Readiness for trial, a "710.30 Notice" that statements made by Corbin would be offered on trial, a DWI Investigative Report, Supporting Deposition, and a DWI Foundation Report (J.A. 5-10). As the New York State Court of Appeals later observed, Glick was "inexplicably unaware that the accident had resulted in a fatality" (Pet. at 3a). According to Glick, the file contained no indication that a death had occurred (T. 20), even though the DWI Foundation Report he sent to the Court refers to "Serious P.I." in two places (J.A. 10).

When Glick marked the case ready for trial he knew that a serious personal injury had occurred (T. 29, 30), but made no effort to ascertain the nature or extent of the injury (T. 31). On October 14th or 15th, ADA Chase took the file from Glick (T. 22). The LaGrange Town Court file contained none of the documents referred to in Glick's October 14, 1987 letter (T. 114-115, 143).

Although the traffic tickets served on the night of the accident directed Corbin to appear in the LaGrange Town Court on October 29, 1987 (J.A. 3, 4), the return date was advanced to October 27th pursuant to a letter from the Court (App. 10, T. 145). The involved members of the

District Attorney's office disclaimed knowledge of this communication; however, the Court Clerk sent ADA Sauter copies of the tickets on October 7, 1987 (J.A. 11, T. 185, *see* T. 138).[2]

On October 27, 1987, Corbin and his attorney appeared in the LaGrange Town Court before Justice Caplicki and pleaded guilty to the traffic offenses (J.A. 11). Justice Caplicki accepted Corbin's guilty plea, but postponed sentencing until "DA night"—November 17, 1987 (*id.*). No prosecutor appeared on October 27, 1987 (the date fixed by the Court, App. 10), because that was not a "DA night," *i.e.*, a night upon which a member of the prosecutor's staff was scheduled to attend. The adjourned sentencing date was selected by Justice Caplicki because it was a "DA night" and because the file contained no sentencing recommendation from the prosecution (J.A. 11, *see* T. at 112-113).

"A.D.A. Chase, who was aware that a person had been killed in the accident, began as early as October 6, 1987 to gather evidence. Despite his active involvement in building a homicide case against [Corbin], however, Chase did not attempt to ascertain the date [Corbin] was scheduled to appear . . . on the traffic tickets, nor did he inform either the Town Justice Court or the assistant district attorney covering that court about his pending investigation." (Pet. at 4a; *see* T. 52-55). On November 12, 1989, however, Chase sent a letter advising Corbin's counsel that the cars involved in the collision had been impounded and examined by the prosecution "in preparation for the Grand Jury proceeding", and were available for inspection by defense counsel (App. 16).

[2]On October 4, 1987, the day following the accident, the Poughkeepsie Journal carried an article ("LaGrange crash kills one") describing the collision, the injuries sustained, the death of Brenda Dirago, the charges filed against Corbin, and the return date of the tickets (App. 35).

On November 17, 1987 ADA Sauter appeared at the LaGrange Town Court, examined the Court file, and satisfied herself that Corbin had no prior record (T. 171, 173). Sauter had no information about the facts of the case. "Nevertheless, Sauter did not request an adjournment so that she could ascertain the facts necessary to make an informed sentencing recommendation" (Pet. at 4a). Sauter recommended that the Court impose the "minimum sentence" (J.A. 12). Corbin was sentenced to a fine, license revocation and other sanctions (J.A. 12, 32). The sentence imposed was satisfied (J.A. 33).

Three and one half months after the accident, on January 19, 1988, Corbin was indicted by the grand jury (J.A. 13-17). He was accused of: (1) Manslaughter in the Second Degree ("recklessly caus[ing] the death of another person * * *" [Penal Law § 120.15]); (2) Vehicular Manslaughter in the Second Degree ("with criminal negligence caused the death of another person * * * by operating a vehicle * * * while he had more than .10 of one per centum of alcohol in his blood" (Penal Law § 125.12(1), (2); Vehicle & Traffic Law § 1192(2)]); (3) Vehicular Manslaughter ("by operating a motor vehicle * * * while in an intoxicated condition" [Penal Law § 125.12(1), (2); Vehicle & Traffic Law § 1192(3)]); (4) Criminally Negligent Homicide ("with criminal negligence caused the death of another person" [Penal Law § 125.10]); (5) Assault in the Third Degree ("recklessly caused physical injury to another" [the husband of the deceased] [Penal Law § 120.00 (2)]); (6) Driving While Intoxicated (.10% alcohol [Vehicle & Traffic Law § 1192(2)]; and (7) Driving While Intoxicated [Vehicle & Traffic Law § 1192(3)].

On February 5, 1988, Corbin was arraigned on the indictment and the prosecution served and filed its Bill of Particulars (J.A. 18-21). The Bill of Particulars specifies

the prosecution's version of the *actus reus*: Corbin [1] "operated a motor vehicle on a public highway in an intoxicated condition having more than .10 percent of alcohol content in his blood"; [2] "failed to keep right and in fact crossed nine feet over the median of the highway"; [3] "while driving at approximately forty-five to fifty miles an hour in heavy rain, which was a speed too fast for the weather and road conditions then pending." (J.A. 20).

Corbin's counsel promptly moved to dismiss the indictment on constitutional and statutory Double Jeopardy grounds (J.A. 22). County Court Judge Hillery directed that a hearing be held to inquire into the events surrounding Corbin's guilty plea in the Town Court (App. 36). The hearing was held on August 12th and 15th, 1988. On August 18, 1988, Judge Hillery denied the motion (Pet. at 1c), finding "that the failure of defense counsel, on October 27, 1987 to inform the Court that these pleas arose out of an incident involving a fatality and further that the failure of counsel to inform the Court on November 17, 1987 of Assistant District Attorney Chase's written communication [of November 12, 1987] leads this Court to no other conclusion than that the proceedings involving the taking of the pleas and the subsequent sentencings were carried out in such a manner and under circumstances which make those procedures as a matter of law a nullity (see CPL Section 40.30, Subd. 2(b)." (Pet. at 8c-9c).[3]

Corbin's lawyers then brought a proceeding under New York Civil Practice Law and Rules Article 78 before the

[3]The New York State Court of Appeals held that the requirements of the cited statute were "simply not satisfied" in this case, noting that the prosecution "failed at every possible turn" to impart to the Town Court its knowledge of the events of October 3, 1987. Pet. at 7a, 8a, 8a n.5. Thus, as much of the Petitioner's Statement of the Case as deals with any alleged "misrepresentation" in the Town Court is now irrelevant.

Appellate Division, Second Department, seeking to prohibit prosecution of the indictment (J.A. 30). The Appellate Division dismissed the petition without opinion (Pet. at 1b). On appeal, the New York State Court of Appeals reversed the judgment of the Appellate Division, granted the petition, and prohibited further prosecution (Pet. at 16a).

The first five counts of the indictment were dismissed in reliance on this Court's dictum in *Illinois v. Vitale*, 447 U.S. 410, 421 (1980) (Pet. at 11a-12a). In addition, the second and third counts were held barred by the holding in *Blockburger v. United States*, 284 U.S. 299 (1932) (Pet. at 12a, n.7). The sixth and seventh counts of the indictment were dismissed on purely State law grounds (Pet. at 13a). Two judges dissented, but did not address the constitutional issues presented by this case (Pet. at 14a *et seq.*).

This Court granted the prosecution's petition for a writ of certiorari on November 6, 1989 (J.A. 36). Petitioner here challenges only the dismissal of the first, fourth and fifth counts of the indictment (Pet. Br., pp. 10, 11).

Summary of Argument

The prosecution seeks to reverse the determination made by the New York State Court of Appeals in this case only insofar as that Court dismissed the first (Manslaughter in the Second Degree), fourth (Criminally Negligent Homicide) and fifth (Assault in the Third Degree) counts of the indictment.

The test found in *Blockburger v. United States*, 284 U.S. 299, 304 (1932) is not the sole standard to be used to determine whether trial of these counts is barred by the previous plea of guilty of and sentence for driving while intoxicated and failure to keep right.

The *Blockburger* case supplies but one of several standards to be applied in determining whether the earlier plea and sentence precludes prosecution of these three counts under the Double Jeopardy Clause. Even though the three counts survive a *Blockburger*-based analysis, the Double Jeopardy Clause bars trial on these counts because the prosecution has revealed that it will rely on driving while intoxicated and failure to keep right to establish respondent's guilt, thus disposing of the Double Jeopardy claim in favor of respondent. *See Illinois v. Vitale*, 447 U.S. 410 (1980), at 421 (majority opinion), 426 (dissenting opinion).

Moreover, principles of collateral estoppel and *res judicata* are part of the Double Jeopardy Clause. *See Ashe v. Swenson*, 397 U.S. 436 (1970). The modern view of *res judicata* as a rule of claim preclusion bars the prosecution of the respondent.

Finally, this Court is urged to hold that the Double Jeopardy Clause limited the prosecution to one proceeding in which it asserted against respondent all the charges that grew out of the occurrence underlying the indictment. *Ashe v. Swenson, supra*, 397 U.S. at 453-454 (Brennan, J., concurring).

Upon the principles derived from *Vitale* and *Ashe*, the Double Jeopardy Clause bars further prosecution of respondent. Having declared its readiness to try respondent for driving while intoxicated and failure to keep right, and having allowed those charges to go to final disposition, the prosecution has no power to put respondent to trial on the first, fourth and fifth counts of the indictment.

ARGUMENT

The Double Jeopardy Clause was properly applied by the New York State Court of Appeals. Further prosecution is precluded.

A. The Specific Problem Presented.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb". "[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. See, *e.g., North Carolina v. Pearce,* 395 US 711, 717." *United States v. Halper,* ___ U.S. ___, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487, 496 (1989).

This case raises for examination the second of these protections, and presents the troublesome question of what the term "same offence" means. Various answers are suggested by decisions of this Court, no one of them commanding unflinching acceptance or providing a satisfactory solution to the discrete problems presented by the myriad factual settings in which the question arises. The "deceptively plain" language of the Double Jeopardy Clause presents "subtle and complex" problems defying "facile or routine" application. *Crist v. Bretz,* 437 U.S. 28, 32 (1978); *United States v. DiFrancesco,* 449 U.S. 117, 127 (1980).

The antiquity of the guarantee against Double Jeopardy notwithstanding, considerable confusion still surrounds its import, and the fact that the term "same offence" means different things in different contexts merely compounds the confusion. The "meaning of the Double Jeopardy Clause is

not always readily apparent", *Tibbs v. Florida,* 457 U.S. 31, 47 (1982) (White, J., dissenting), and the guarantee is "one of the least understood", producing decisions "replete with *mea culpa's*", *Whalen v. United States,* 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

This case again forced a State court to wrestle with the Double Jeopardy questions created when an automobile accident spawns both misdemeanor or lower charges under local traffic laws (*e.g.,* New York Vehicle & Traffic Law §§ 1192[2], [3]; 1120 [a]) and later-asserted felony charges alleging the offender's responsibility for death or serious physical injury caused by the same accident.[4] A few of these cases have come for decision by this Court in the last decade.

In 1980, *Illinois v. Vitale,* 447 U.S. 410, held: " '[I]f manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the *Blockburger* [*v. United States,* 284 U.S. 299 (1932)] test. *The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.*' [*Illinois v. Vitale,* 447 U.S. 410] at 419 (emphasis supplied)." *Illinois v. Zegart,* 452 U.S. 948, 950 (1981) (Burger, C.J., dissenting from denial of certiorari). Dictum in the *Vitale* opinion suggested the problem that arose but evaded decision in two subsequent cases and which confronts this Court today: "[I]f in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident [the charge upon which Vitale had been tried and convicted] as the reckless act necessary to prove manslaughter, Vitale would have a *substantial* claim of double

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[4] *See, e.g., State v. Lonergan,* 213 Conn. 74, 566 A.2d 677 (1989) (collecting cases).

jeopardy." *Illinois v. Vitale, supra,* 447 U.S. at 421 (emphasis added). The dissent in *Vitale* enlarged on this dictum by observing that if the prosecution found it necessary to rely on Vitale's failure to reduce speed to make out its manslaughter case, Vitale's Double Jeopardy claim "would not only be 'substantial'; it would be dispositive." *Id.* at 426 (Stevens, J., dissenting).

In 1984, *Thigpen v. Roberts,* 468 U.S. 27, presented a similar double jeopardy question in a habeas corpus setting. The Fifth Circuit held that prosecution of Roberts was barred by the Double Jeopardy Clause because, under *Vitale,* "[t]he focus . . . is on the evidence actually presented at trial. . . . The same evidence that led to Robert's [*sic*] conviction on the misdemeanor charge was also introduced in the manslaughter trial. . . . Because Roberts has a substantial double jeopardy claim under the . . . holding in *Illinois v. Vitale,* the district court's granting of habeas corpus relief must be affirmed." Pet. for Cert., *Thigpen v. Roberts,* pp. A12-A13.[5] The accuracy of the Fifth Circuit's analysis of the impact of *Vitale* was not decided because this Court affirmed the result reached below on other grounds.[6]

And in 1985, *Fugate v. New Mexico,* 470 U.S. 904 (*reh. den.,* 471 U.S. 1112), affirmed, by an evenly divided Court, the State's rejection of Fugate's Double Jeopardy claim that his guilty plea and sentence on driving while intoxicated and careless driving barred his subsequent trial and conviction for homicide by vehicle. *See* summary of the oral argument in *Fugate,* 53 U.S.L.W. 3609-3610 (1985).

[5]The *per curiam* opinion of the Fifth Circuit in *Roberts v. Thigpen* was not published. *See* 693 F.2d 132 (1982). It was included as "Exhibit 4" (pp. A7-A13) in the Appendix to the Petition for a Writ of Certiorari in *Thigpen v. Roberts.* The above-quoted language is taken from that Appendix.

[6]Then Justice Rehnquist dissented and rejected the applicability of *Vitale's* dicta to Roberts' situation. 468 U.S. at 36-39.

B. *Blockburger* is Not the Sole Criterion.

The petitioner argues that in this case constitutional analysis should begin and end with the *Blockburger* test. The simple answer to the suggestion that *Blockburger* does it all was provided in *Brown v. Ohio,* 432 U.S. 161, 166-167, n.6 (1977):

> The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first.

We agree that the *Blockburger* test should not "be abandoned or expanded." (Pet. Br., p. 10). It should be kept where it belongs—as a useful tool for divining legislative intent and determining whether cumulative punishment is constitutionally permissible after conviction upon multiple counts in a single accusatory instrument. *See Jones v. Thomas,* ___ U.S. ___, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989), *reh. den.,* ___ U.S. ___, 110 S.Ct. 12, 106 L.Ed.2d627; *Missouri v. Hunter,* 459 U.S. 359 (1983); *State ex rel. Bulloch v. Seier,* 771 S.W.2d 71 (Mo. 1989), *cert. den. sub nom. Missouri v. Bulloch,* ___ U.S. ___, 58 U.S.L.W. 3421 (1990). *Blockburger* was formulated and has its proper application in a single trial, multiple punishment case. *Blockburger* should not be allowed to run amok and become the sole standard for determining the constitutionality of consecutive prosecutions generated by the

accused's conduct at a limited time, in a limited place and under limited factual circumstances.

Multiple punishment for the same offense is only one of the abuses against which the Double Jeopardy Clause guards. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Use of *Blockburger* to diminish the protection against another abuse—multiple prosecution by a single State—deprives the great constitutional protection of the Double Jeopardy Clause of much of its significance by giving it "a narrow, grudging application", *Green v. United States*, 355 U.S. 184, 198 (1957), reflected by an arid exercise in word-matching statutes, "a mere matter of formal pleading", *People v. Silverman*, 281 N.Y. 457, 462, 24 N.E.2d 124, 126 (1939), inimical to the injunction that Double Jeopardy principles are "not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). As one of the precious protections provided by the Bill of Rights, the Double Jeopardy Clause cannot be reduced to a mere matter of statutory construction unimpeded by the reality of the particular case.

The statement in *Green v. United States*, 355 U.S. 184, 187-188 (1957) has been frequently cited in the opinions of this Court:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The Double Jeopardy Clause "serves principally as a restraint on courts and prosecutors." *Brown v. Ohio, supra*, 432 U.S. at 165. "Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Tibbs v. Florida, supra*, 457 U.S. at 41. Allowing prosecution of Corbin on the indictment would be an open invitation to an overzealous prosecutor to use the trial of a traffic offense as a kind of dress rehearsal for a later murder or manslaughter trial. This cannot be. *Id.*[7]

The New York State Court of Appeals held that Vehicle & Traffic Law § 1800(d) takes precedence over the general statutory rules which would bar this prosecution. Pet. at 10a. That statute provides: "A conviction of violation of any provision of this chapter shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle or motorcycle." Without § 1800(d), this case could have been disposed of below solely on State law grounds.

Vehicle & Traffic Law § 1800(d) would permit subsequent prosecutions even under circumstances violative of the *Blockburger* test. The petitioner here tacitly recognizes the facial infirmity of § 1800(d), by eschewing any claim that the second and third counts of the indictment may be prosecuted, even though § 1800(d) would, as written, clearly permit these counts to proceed to trial.

Section 1800(d) is apparently formed by the sentiment that citizens confronting traffic charges are somehow

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[7]The conviction of respondent before the LaGrange Town Court bars prosecution of the first, fourth and fifth counts in the indictment, New York Vehicle & Traffic Law § 1800(d) notwithstanding. To the extent that § 1800(d) might be construed to interfere with or abridge Corbin's right not to be twice placed in jeopardy, that statute "cannot constitutionally be applied" (Pet. at 12a).

excluded from the protection of the Double Jeopardy Clause. *See, e.g., People v. Jackson*, 118 Ill.2d 179, 514 N.E.2d 983, 988-989 (1987). *But see Illinois v. Vitale*, 447 U.S. 410 (1980). Expressing the sentiment shows its grotesqueness. As a practical matter, a vast number of Americans who face the criminal justice system face it in response to alleged violations of traffic laws. Often these charges carry the potential for incarceration. For example, Corbin's plea of guilty exposed him to the possibility of a one year jail term, in addition to a fine. Even the sanction of license revocation, superficially a small inconvenience, is magnified when imposed upon one living in largely rural Dutchess County, New York.

By effectively excluding traffic offenders from the fundamental protections embodied in the Double Jeopardy Clause, Vehicle & Traffic Law § 1800(d) undermines the principles of the Bill of Rights. The statute singles out traffic offenders and excepts them as a group of pariahs, to whom the State gives no protection and from whom the State would deserve sullen contempt. Once § 1800(d) is removed from consideration, the disposition of this case in Corbin's favor would rest entirely on State law grounds, saving resolution of the reach of the Double Jeopardy Clause for another, more appropriate case.

C. *Vitale* Precludes Subsequent Prosecution Based on the Same Evidence.

Constitutional Double Jeopardy analysis properly begins with the *Blockburger* test; it does not end there. The standards suggested by this Court in *Illinois v. Vitale*, 447 U.S. 410 (1980) and the principles underlying the Double Jeopardy Clause prohibit trial of the indictment in this case.

Employing a two-tiered analysis inspired by *Vitale* aptly demonstrates Corbin's "substantial" Double Jeopardy claim. Vitale, like Corbin, was involved in an automobile accident that resulted in death. After Vitale was convicted for failing to reduce speed, a traffic offense, the State attempted to prosecute him for manslaughter. The Illinois Supreme Court held that the two offenses were the same for Double Jeopardy purposes, *see* 447 U.S. at 414-415. This Court reiterated the principle that "the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial," *id.* at 416, and held: "The *mere possibility* that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution." *Id.* at 419 (emphasis added).

Vitale did not end the inquiry there. It went on to note that "it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*, 433 U.S. 682 (1977) . . . [I]f in the pending manslaughter prosecution Illinois relies on and proves a failure to slow . . . as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy. . . ." 447 U.S. at 419-420, 421 (footnotes omitted). The dissent opined that if the prosecution found it necessary to rely upon the "failure to reduce speed in order to sustain its manslaughter case", Vitale's Double Jeopardy claim "would not merely be 'substantial'; it would be dispositive." *Id.* at 426 (Stevens, J., dissenting).

The "pointed dictum" in *Vitale* was held to have "direct application" in this case by the New York State Court of Appeals (*see* Pet. at 11a). The uncertainty about the nature of the State's evidence in *Vitale* sprang from the fact that the State had somehow managed to avoid revealing the basis of its manslaughter prosecution. *See* 447 U.S. at 426. The reason for remanding *Vitale* was the need to ascertain the facts underlying the indictment "because the reckless act or acts the State will rely on to prove manslaughter are still unknown. . . ." *Id.* at 421.[8] Here, the prosecutor has revealed—before trial—that this second prosecution necessarily requires evidence of the same conduct underlying the offenses for which Corbin has already been convicted. Factual identity is shown by the prosecution's Bill of Particulars (J.A. 20-21):

> Based upon the foregoing, it is apparent that the defendant operated a motor vehicle on a public highway in an intoxicated condition having more than .10 percent of alcohol content in his blood, that he failed to keep right and in fact crossed nine feet over the median of the highway while driving at approximately forty-five to fifty miles an hour. . . . By so operating his vehicle in the manner above described, the defendant was aware of and consciously disregarded a substantial and unjustifiable risk. . . . By his failure to perceive this risk while

[8]The suggestion "that *Vitale* mandated a strict application of *Blockburger* is refuted by the fact that the *Vitale* court remanded the case for further factual clarification regarding what the state's proof was to be in the subsequent trial. If . . . only a *Blockburger* comparison of the statutory elements was prescribed by *Vitale*, then it would have made no difference what the state's proof would have been in the subsequent trial." *State v. Lonergan*, 213 Conn. 74, 88, 566 A.2d 677, 684 (1989); *see* Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 Iowa L. Rev. 323, 352 (1986).

> operating a vehicle in a criminally negligent and reckless manner, he caused physical injury to Daniel Dirago and the death of his wife, Brenda Dirago.

The prosecution's Bill of Particulars (J.A. 18-21) thus supplies the very specificity lacking in *Vitale*. As held by the New York State Court of Appeals: "Although [reckless manslaughter, criminally negligent homicide and third degree reckless assault] are clearly not the 'same offenses' as the traffic offenses to which [Corbin] previously pleaded guilty . . . the prosecution here has affirmatively stated in its bill of particulars that it intends to use the acts underlying the latter offenses as the major part of its proof on the reckless and negligence elements of the former crimes. This statement of the prosecution's theory became a part of its pleadings and, until amended, was binding on the People. . . . Thus, unlike [*Vitale*], there is no need in this case to await the trial to ascertain whether the prosecution will rely on the prior traffic offenses as the acts necessary to prove the homicide and assault charges. The 'substantial' double jeopardy problem identified in *Vitale* is apparent on the face of the People's pleadings here." (Pet. at 11a-12a; citations omitted).[9]

Contrary to the prosecution's assertion, reliance upon *Vitale* does not "abandon or expand" the *Blockburger* test (*see* Pet. Br. at 10). As *Vitale* shows, *Blockburger* is "the

[9]If one were to remove driving while intoxicated and failure to keep right from the bill of particulars, all one has left is the allegation that the accident occurred while Corbin was "driving at approximately forty-five to fifty miles an hour." As a matter of New York law this lone fact would not support a conviction. To illustrate: in *People v. Perry*, 123 A.D.2d 492, 507 N.Y.S.2d 90 (4th Dep't 1986), *affd. for the reasons below*, 70 N.Y.2d 626, 512 N.E.2d 540, 518 N.Y.S.2d 957 (1987), the fatal accident occurred when Perry was driving at 80 miles per hour, on a country road on a dark night. The intermediate appellate court reversed the judgment convicting Perry of criminally negligent homicide (New York Penal Law § 125.10) holding that this evidence was insufficient to constitute criminal negligence.

principal test for determining whether two offenses are the same for purposes of barring successive prosecutions." 447 U.S. at 416. However, it has never been held to be the *exclusive* standard employed in Double Jeopardy analysis.[10]

As suggested in *Vitale*, and reflected in the decision of the New York State Court of Appeals in this case, *Blockburger* constitutes the first hurdle to be overcome in successive prosecution cases. If the offenses are the "same" under *Blockburger*, further prosecution is precluded. If the prosecution survives the *Blockburger* test, the inquiry *proceeds* to determine whether the evidence to be relied on by the prosecution in the subsequent indictment is essentially the same as that underlying the prior conviction.

"In short, the court in *Vitale* indicated that there are two ways of detecting double jeopardy violations in successive prosecution cases. First, the *Blockburger* test may categorize the two offenses as being the same. Second, an examination of the evidence may be undertaken to determine if the second offense requires proof that was already offered to prove the first offense." *State v. Lonergan*, 213 Conn. 74, 84, 566 A.2d 677, 682 (1989); *see* Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 Iowa L. Rev. 323, 350-352 (1986).

"[I]t seems far more preferable to adjudicate all criminal liability for a single course of conduct in one proceeding, even if multiple convictions result, than to allow the government to bring a series of trials based on that conduct. In a single proceeding, the worst that can happen is the court will impose additional punishment. If a series of trials develops, however, the repeated litigation becomes a punishment in itself irrespective of the ultimate outcome." Thomas, *The Prohibition of Successive Prosecutions, supra*, at 342. As this Court has long recognized, it is "very clear that where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *In re Nielson*, 131 U.S. 176, 188 (1889).

"Thus, '[g]iven the multiplicity of offenses that may arise from a single criminal transaction, the formalistic *Blockburger* test, with its narrow focus on the technical elements of the offenses charged, is inadequate to vindicate this constitutional guarantee against retrial. The general test for determining whether successive prosecutions involve the "same offense" is therefore a more flexible and pragmatic one, which focuses not on the formal elements of the two offenses but rather on the proof actually utilized to establish them.'" *State v. Lonergan, supra*, 213 Conn. at 91, 566 A.2d at 686, quoting *United States v. Ragins*, 840 F.2d 1184, 1188 (4th Cir. 1988).

The prosecution in this case violates the protection afforded by the Double Jeopardy Clause by subjecting Corbin to multiple prosecutions for the same conduct.

D. Further Prosecution is Barred by the "Claim Preclusion" Aspect of the Double Jeopardy Clause.

The related principles of *res judicata* and collateral estoppel are an integral part of the Double Jeopardy Clause. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *Turner v. Arkansas*, 407 U.S. 366, 368 (1972); *Dowling v. United*

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[10]The *Blockburger* test "is not talismanic," *State v. Lonergan, supra* n. 8, 213 Conn. at 88 n. 5, 566 A.2d at 684 n. 5, but rather a rule of statutory construction, to be employed in what is "essentially a factual inquiry as to legislative intent [rather than] a conclusive presumption of law." *Garrett v. United States*, 471 U.S. 773, 779 (1985), *reh. den.*, 473 U.S. 927; *see Whalen v. United States*, 445 U.S. 684, 708 (1980) (Rehnquist, J., dissenting).

States, ___ U.S. ___, 58 U.S.L.W. 4124 (decided 1/10/90). "A primary purpose served by [the Double Jeopardy Clause] is akin to that served by the doctrines of *res judicata* and collateral estoppel—to preserve the finality of judgments." *Crist v. Bretz*, 437 U.S. 28, 33 (1978) (footnote omitted). The Double Jeopardy Clause promotes finality regardless of the outcome of the first prosecution, *Brown v. Ohio*, 432 U.S. 161, 165-166 (1977). Finality is assured by barring "relitigation between the same parties of issues actually determined at a previous trial", *Ashe v. Swenson*, *supra*, 397 U.S. at 442. The Double Jeopardy Clause serves "a constitutional policy of finality for the defendant's benefit" when successive prosecutions are brought, *United States v. Jorn*, 400 U.S. 470, 479 (1971).

Over a half century before the decision in *Ashe*, Justice Holmes said: "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt. . . . [T]he Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice. . . ." *United States v. Oppenheimer*, 242 U.S. 85, 87; 88 (1916).

This "fundamental principle of justice" employs two concepts: "issue preclusion" (collateral estoppel) and "claim preclusion" (*res judicata*). Restatement (Second) of Judgments (1982), § 18 provides that a successful "plaintiff cannot . . . maintain an action on the original claim or any part thereof. . . ." Section 24 of the Restatement (Second) defines the scope of the doctrine of claim preclusion:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Because the Double Jeopardy Clause reflects a "willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws", *United States v. Jorn*, *supra*, 400 U.S. at 479, and if "a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense", *United States v. Wilson*, 420 U.S. 332, 343 (1975), then the result reached by the New York State Court of Appeals in this case was correct and Corbin may not be further prosecuted.

One may object to the foregoing analysis because the prosecutorial arm of the State fell asleep in this case, and the prosecution-barring adjudication rested on a plea, not on a judgment after trial. The judgment here should be given preclusive effect because "a guilty plea is equivalent to a conviction after trial for issue preclusion purposes", *Merchants Mutual Ins. Co. v. Arzillo*, 98 A.D.2d 495, 504, 472 N.Y.S.2d 97, 103 (2d Dep't 1984) (collecting cases). Even the common law "forbid a second trial for the same offense, whether the accused had suffered punishment or

not, and whether in the former trial he had been acquitted or convicted", *Ex Parte Lange*, 18 Wall. 163, 169 (1874).

No decision implementing the protections provided by the Double Jeopardy Clause should excuse, condone or encourage "a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time." *Brock v. North Carolina*, 344 U.S. 424, 429 (1953) (Frankfurter, J., concurring). *Sole* responsibility for creating the problem in this case rests upon specific members of the staff of the District Attorney.

New York law clearly defines the prophylactic step that could and should have been taken by the prosecution in this case. Criminal Procedure Law § 170.20(2) permits the prosecution to apply for an adjournment of the proceedings in the local criminal court upon the ground that the prosecution intends to present the charges in question to a grand jury. Section 170.20(2) goes on to provide that once invoked by the prosecutor, "the local criminal court *must* adjourn the proceedings to a date which affords the district attorney reasonable opportunity to pursue such action, and may subsequently grant further adjournments for that purpose as are reasonable under the circumstances." (Emphasis added.) "This record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them.... The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach ... was inadvertent does not lessen its impact." *Santobello v. New York*, 404 U.S. 257, 260, 262 (1971).

In this case, the prosecution did not meet its burden of "letting the left hand know what the right hand is doing." Even more importantly, this case shows not only a lack of continuity between the various assistant district attorneys, but a seeming nonchalance about the fatality involved. ADA Dolan, the supervisor of ADAs Chase, Glick and Sauter (T. 205), was at the scene of the accident on the night of October 3, 1987 and chose not to press charges against Corbin other than those for driving while intoxicated and failure to keep right; he was, by his own testimony, informed that same evening of the death of Mrs. Dirago (T. 207). When questioned about what he did at this point, ADA Dolan replied, simply, "Nothing." (T. 207). The prosecution dawdled over three months after the accident and approximately two months after the guilty plea before indicting Corbin on charges arising out of the same criminal episode.

Recognizing that the Double Jeopardy Clause protects Corbin would promote the desired end of assuring finality of the judgment and facilitate the administration of criminal justice by compelling law enforcement agents to be aware of their duty to coordinate their activities so that issues determined in apparently minor cases do not prevent prosecution of more serious offenses.

We also suggest that this Court reconsider its steadfast refusal, *see Garrett v. United States*, 471 U.S. 773, 790 (1985), *reh. den.*, 473 U.S. 927, and adopt Mr. Justice Brennan's view stated in concurrence in *Ashe*: "[T]he Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. This 'same transaction' test of 'same offense' not only enforces the ancient prohibition against vexatious multiple prosecutions

embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience." 397 U.S. at 453-454 (footnote omitted).

This "same transaction" test complements *Blockburger*, *Vitale* and *Ashe*, and serves to stabilize Double Jeopardy jurisprudence without placing any greater burden on prosecutors than the ancient duty to pay attention to what they are doing.

CONCLUSION

The essential purposes of the Double Jeopardy Clause were served in this case. The judgment of the New York State Court of Appeals should be affirmed.

Respectfully submitted,

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